[2026] UKPC 31
Privy Council Appeal No 0063 and 0065 and 0065/A of 2025

JUDGMENT

Aeden Balwah (by Shelly-Ann Balwah, his Mother and Next Friend) and another (Respondents) *v* Marwan Ahmad Alsayed Abdulla (Appellant) (Trinidad & Tobago); Aeden Balwah (by Shelly-Ann Balwah, his Mother and Next Friend) (Respondent) *v* Surgi-Med Clinic Co Limited (Appellant) (Trinidad & Tobago); Aeden Balwah (by Shelly-Ann Balwah, his Mother and Next Friend) (Appellant) *v* Surgi-Med Clinic Co Ltd and another (Respondents) No 2 (Trinidad & Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Lloyd-Jones
Lord Stephens
Lord Doherty
Lady Wise
Lord Burnett

JUDGMENT GIVEN ON
28 August 2026

Heard on 22 and 23 July 2026

Appellant/Cross-Respondent
Robert Strang
Kiel Taklalsingh
Stefan Ramkissoon
(Instructed by Johanna Richards, Sovereign Chambers (Trinidad))

Respondent/Cross-Appellant
Dr Michael Powers KC
Rajiv Persad SC
Ricardo Williams
Niala Narine
(Instructed by Simons Muirhead Burton LLP (London))

First Respondent (Surgi-Med)
Benjamin Browne KC
Finn Callow
Narad Harrikissoon
Andre Sinanan
(Instructed by Harrikissoon and Company (Trinidad))

LADY WISE:

Introduction

1. These two appeals come before the Board from the Court of Appeal of the Republic of Trinidad and Tobago. They involve proceedings for medical negligence brought on behalf of Aeden Balwah ("Aeden"), a young man now aged 24 who has cerebral palsy, by his mother and next friend Shelly-Ann Balwah ("Mrs Balwah") against a private hospital, Surgi-Med Clinic Co Ltd ("Surgi-Med") and a private medical practitioner, Dr Marwan Abdulla ("Dr Abdulla"). Aeden was born at Surgi-Med and Dr Abdulla delivered him. Both Surgi-Med and Dr Abdulla succeeded in resisting Aeden's claim in the High Court. Aeden appealed against that decision to the Court of Appeal. That was successful to the extent that negligence on Dr Abdulla's part was found established. Aeden's appeal against Surgi-Med was unsuccessful. Dr Abdulla now appeals to the Board to overturn the finding of negligence made against him. Aeden appeals against the Court of Appeal's decision to uphold the High Court's ruling that he had failed to prove his case against Surgi-Med. Surgi-Med has a cross-appeal to address matters in the event of Aeden successfully defending Dr Abdulla's appeal.

2. In general terms, the appeals concern (i) the extent to which it is proper for an appellate court to interfere with primary findings of fact made by a first instance judge and (ii) the correct approach to the admissibility of evidence contrary to a party's written case and without amendment of that case.

Factual summary

3. Mrs Balwah was a private patient of Dr Abdulla during her pregnancy with Aeden, her first child. Her pregnancy ran beyond term, and she and Dr Abdulla agreed that she would be admitted to hospital for induction of labour. She was admitted to Surgi-Med for that purpose at about 6.30 pm on 18 May 2002 when she was one day short of 41 weeks' gestation. At the material time Dr Abdulla was a self-employed medical practitioner who used Surgi-Med's facilities, which included an operating theatre and delivery room. Surgi-Med employed nurses who carried out instructions given to them by attending physicians such as Dr Abdulla.

4. Following Mrs Balwah's admission on 18 May 2002, Dr Abdulla attended her. At around 8.00 pm he inserted a 200-mcg tablet of misoprostol to soften the cervix and expedite the onset of labour. He then left Mrs Balwah in the care of nurses employed by Surgi-Med. There was no foetal monitoring between 8.00 pm on 18 May and about 12.30 am on 19 May by those nurses. At 2.15 am on 19 May Mrs Balwah reported suffering pain and nurses at the hospital called Dr Abdulla, who prescribed appropriate pain relief, a drug known as Trabilin (tramadol).

5. While the specific time at which relevant events occurred thereafter became central to the outcome of the litigation, Mrs Balwah's membranes ruptured at either 3.00 or 3.30 am and Dr Abdulla was subsequently called to attend. He arrived at the hospital at 4.00 am, shortly thereafter, or at 4.30 am. He confirmed that Mrs Balwah's cervix was fully dilated and so in second stage labour. Vaginal delivery was attempted for an hour but was unsuccessful. An episiotomy was executed in anticipation of delivery. Intermittent foetal heart rate monitoring was carried out by a nurse using a handheld Doppler device. No irregular heart rate was measured. At the end of the one-hour period a decision was taken to perform an emergency caesarean section and Dr Abdulla delivered Aeden at 6.15 am on 19 May.

6. Immediately after birth Aeden's Apgar scores were recorded. Apgar is an acronym of appearance, pulse, grimace, activity and respiratory function, all measured to assess a newborn's health. Each of the five markers can achieve a maximum score of 2 and are added together for a total score. Aeden's scores were 1 after one minute and 5 after three minutes, in contrast with an expected Apgar score following birth by caesarean section of 10 at one minute. He required resuscitation by suction and a handheld breathing bag. At ten minutes he had an Apgar score of 10. He was transported to a local hospital, San Fernando General Hospital, in his father's vehicle. A note from Dr Raymond Aguilar, a paediatrician who had attended the birth and treated Aeden immediately thereafter accompanied his admission, giving the following information:

> "a. Prolonged Second Stage;
>
> "b. Hypoxic Ischaemic Encephalopathy — Stage II;
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> "c. History of Episodes of twitching and neonatal seizures;
>
> "d. Birth Asphyxia; and
>
> "e. Hypotonic."

7. Over the course of the following week Aeden continued to suffer seizures and distressed breathing in hospital. A CT scan of his brain performed at 19 days (6 June 2002), was contemporaneously interpreted, wrongly, as normal. Following further investigation and monitoring, Aeden was diagnosed with spastic cerebral palsy, developmental delays, microcephaly and seizure disorder. The CT scan was ultimately reviewed and it was agreed by the parties' experts at trial to show abnormalities. Due to insufficient quality of the imaging, the experts were unable to agree on the specific abnormalities exhibited. Aeden continues to suffer from severe intellectual and cognitive impairment and epilepsy.

Proceedings in the High Court

8. Mrs Balwah brought proceedings for Aeden in the High Court against Surgi-Med, Dr Abdulla and Dr Aguilar in May 2013, claiming that Aeden's cerebral palsy was the result of a hypoxic ischaemic brain injury during labour. Dr Aguilar was subsequently released from the action. During the procedural journey of the litigation various amendments to the written pleadings were made. The pleaded position of all parties on the issue of the timing of Mrs Balwah's labour is relevant to the issues remaining in contention before the Board. At para 17(g) of his initial Statement of Case, Aeden narrated that Dr Abdulla arrived at the hospital at approximately 4.00 am on 19 May 2002 and that Mrs Balwah was taken to the delivery room. Para 17(h) stated that between 4.00 am and 5.00 am that day vaginal delivery was attempted without success. Those two paragraphs were admitted in a Joint Statement of Defence by Surgi-Med, Dr Abdulla and Dr Aguilar. In February 2016 Aeden amended his case in relation to various matters. On the question of timing, his averments continued to read that "At approximately 4.00 am [Dr Abdulla] arrived and Mrs Balwah was taken to the delivery room". In response to Aeden's amendments, Surgi-Med and Dr Abdulla filed separate defences, in March and April 2016 respectively. Both sets of defences admitted the averments about the time of arrival of Dr Abdulla and attempts at delivery. However, Dr Abdulla also averred that he was summoned when Mrs Balwah's cervix was fully dilated at 4.30 am and that between 4.30 am and the time of the caesarean section, the midwife monitored the foetal heart rate in his presence every five to ten minutes.

9. On 20 September 2016 Dr Abdulla filed a formal witness statement with the court, which he subsequently adopted as his evidence at trial. At paras 34–37 of that statement, he stated that he had been called by the midwife at or about 4.00 am on 19 May 2002 and after a discussion about Mrs Balwah's progress he left to go to the hospital to see the patient. He stated that he arrived there at 4.30 am and examined Mrs Balwah who was fully dilated with moderate to severe contractions. At 5.30 am the decision was made to perform a caesarean section due to a failure to progress during the second stage of labour.

10. The case went to trial before Ramcharan J in March 2019. During the trial the significance of the disparity as to the precise time of attempted delivery became apparent. On the sixth day Surgi-Med filed a re-amended defence, including the following statement:

> "(i) It is admitted that [Dr Abdulla] arrived shortly after 4.00 am and that thereafter Mrs Balwah was taken to the delivery room.
>
> (ii) It is admitted that a vaginal delivery was attempted for an hour before 5.30 am but save as aforesaid (h) is not admitted."

Surgi-Med's amendment on timing was granted unopposed. Dr Abdulla did not seek to amend further at that stage.

11. During the evidence of Dr Abdulla, Aeden's counsel sought to draw attention to the inconsistency between his witness statement and his written case in relation to the timing of his arrival at the hospital on 19 May and the period of attempted delivery. In response, Dr Abdulla's counsel indicated that if Dr Abdulla remained unshaken in his evidence that he arrived at the hospital at 4.30 am she would consider matters and "make the appropriate amendment to the pleading". The trial judge indicated to counsel that he considered that the issue was one of credibility and could be raised in submissions. In fact, no further application to re-amend the pleadings was made on Dr Abdulla's behalf.

12. A number of contentious issues were ventilated during the factual and expert evidence at the trial. Both defendants denied any breach of the duty of care owed to Mrs Balwah. Aeden contended that one of the ways in which Dr Abdulla had breached that duty was by using a 200-mcg tablet of misoprostol. A skilled witness to fact, Dr Jehan Ali, gave evidence about a clinical trial in 2000 which suggested that a lower dose of 50 mcg of misoprostol might avoid complications including hyper-stimulation, foetal distress and foetal death. One of Aeden's expert witnesses, Dr Rotimi Jaiyesimi, a consultant obstetrician and gynaecologist, confirmed that in November 2000 the American College of Obstetricians and Gynecologists had issued a statement to its members indicating that they should use a 25-mcg dose of misoprostol. While Dr L Douglas Wilkerson, one of Dr Abdulla's expert witnesses, disputed that 200 mcg of misoprostol was an overdose, his focus was primarily on whether the dose administered had caused any foetal distress. Dr Paul Sinkhorn, also called by Dr Abdulla, disputed that in 2002 there was any international consensus on the optimal dosage of misoprostol, but agreed that there was now general consensus, reached through trial and error, that a dosage between 25 mcg and 50 mcg was optimal.

13. There was contested evidence about the extent of any foetal heart rate ("FHR") monitoring undertaken both in the four hours or so following the administration of misoprostol and in the later period of attempted vaginal delivery. There were no entries in the clinic's notes recording the FHR between Dr Abdulla's departure at 8.30 pm and 12.30 am on 19 May. None of the nurses who looked after Mrs Balwah were available to give evidence; all had died prior to trial. Dr Abdulla spoke to the period of attempted delivery during second stage labour and said that the FHR had been monitored using a Doppler. His position was that the monitoring had been conducted at regular intervals by Nurse Hosten, who had reported to him verbally between 4.30 am and 5.30 am on each occasion that the FHR was regular. Dr Abdulla had made a note that the FHR was regular when the decision had been taken to proceed to a caesarean section.

14. The potential causes of Aeden's injury were explored at length in the evidence. Dr David Milligan and Dr Jaiyesimi considered it likely that the injury had occurred during

the second stage of labour when, as they understood it, FHR monitoring had not been carried out. The records disclosed only eight FHR recordings in a period of about nine-hours. There had been ample time for hypoxia-ischaemia to have occurred unnoticed. Such a hypoxia-ischaemia insult during labour was on balance the cause of Aeden's encephalopathy and brain injury. While the essential criteria for a diagnosis of hypoxia-ischaemia—Apgar scores of below 5 at five and ten minutes, foetal umbilical artery acidaemia at pH7 or base deficit equal to or above 12 and multisystem organ failure—may not have been strictly fulfilled, Dr Milligan considered that the neonatal picture generally fitted with that cause. Dr Wellesley St Clair Forbes, a consultant neuroradiologist expert witness led in Aeden's case, considered that the brain injury was likely to have occurred in the period leading up to birth. The neuroimaging showed a brain that was morphologically normal prior to the insult responsible for the hypoxia-ischaemia brain injury. No definitive timing of the insult could be made on the basis of the scan.

15. Dr Wilkerson, an Adolescent and Paediatric Neurologist, postulated a pre-natal viral infection as at least a theoretical possibility for causation. The alternative explanation of a hypoxia-ischaemia event would have had to be prolonged, no shorter than 45–60 minutes and of greater magnitude than was compatible with the records. Prolonged partial hypoxia-ischaemia ("PPHI") would have produced more respiratory depression and concomitant major organ failure, both features lacking in this case. On balance the cause was likely to be hypoxia-ischaemia of unknown cause occurring late in the third trimester of gestation, not during labour. The degree of injury was far too great to be explained by a hypothesis of simple PPHI intrapartum. Dr Sinkhorn, an obstetrician and gynaecologist, also considered it remarkable that there was no damage to organs other than the brain if there had been severe hypoxia during labour.

16. The trial judge gave an incomplete oral decision on 17 January 2020, followed by a draft written judgment on 8 January 2021 and a final written judgment on 4 September 2021. The Board is concerned only with the last of these. In that judgment, prior to providing his substantive analysis, the trial judge addressed two preliminary issues, one which is relevant to the case before the Board. It was described as a question of pleadings. In light of the admissions made in the pleadings, particularly by Dr Abdulla, in relation to the time of his arrival at the clinic in the early hours of 19 May (recorded at para 8 above), Aeden's counsel contended that he ought not to be allowed to derogate from that position. As a matter of law, a party could not so derogate. Dr Abdulla's counsel submitted that the court could not close its eyes to the evidence that had been led which was contrary to the pleaded admission. The judge considered that it would be "foolish for a court in the face of clear evidence to the contrary to blindly hold to the position that a party who has said something in his pleadings" should be bound by it. He regarded any inconsistency between Dr Abdulla's pleadings and his evidence to be a matter going to credibility.

17. On the expert witness evidence generally, the trial judge indicated that all the experts had their own strengths, whether academic or practical. However, he had not been impressed by the evidence of Dr Jaiyesimi under cross-examination as he had appeared to be advocating for the claimant rather than assisting the court. His expert report would be given the least weight.

18. In his substantive analysis, the trial judge referred to the applicable test for negligence in this context laid down in *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582. He recorded that it was accepted that duties of care were owed by both Surgi-Med and Dr Abdulla to Mrs Balwah. He was required to decide whether and to what extent either or both defendants had breached those duties and if so, whether those breaches or any of them had, on balance, caused injury to Aeden. The duties owed by Dr Abdulla had been to competently deliver Aeden and not to do anything that would cause Aeden or his mother avoidable harm. A single breach of duty by Dr Abdulla was found established. He had breached his duty of care to Mrs Balwah by using a 200-mcg tablet of misoprostol "as [a] reasonable body of professionals would [not have done so] without extremely good cause given the elevated risk".

19. The requisite duty owed by Surgi-Med was to maintain a proper record of the condition of Aeden and his mother during their stay at the clinic. The trial judge found that duty had been breached in three specified ways: (i) there was no record of Aeden's discharge and transfer to the local general hospital, (ii) there was very little record of Aeden's condition after birth and prior to discharge and (iii) there was no monitoring of Aeden's heart rate between 8.00 pm and 12.30 am contrary to the instructions given to Surgi-Med's nurses by Dr Abdulla, whose evidence on the point was accepted. The trial judge made no express findings in fact or of breach of duty in relation to the adequacy of FHR monitoring during the period of attempted vaginal delivery and prior to birth by caesarean section, although that matter had been put in issue by Aeden. It was left unaddressed in the judgment.

20. Having found these specific breaches of duty established, the trial judge considered the requirement to prove causation. So far as Dr Abdulla's breach of duty by administering an overdose of misoprostol was concerned, Aeden had failed to establish that on balance that breach was causative of his injury. In reaching that conclusion the trial judge relied on the recovery of the Apgar score to a perfect 10 after ten minutes, the CT scan of 6 June 2002 that indicated a brain injury that could have been caused either prepartum (before labour) or intrapartum (during labour) and the absence of any recorded monitoring suggestive of foetal distress. It was accepted on behalf of Aeden both before the Court of Appeal and at the hearing before the Board that the judge was entitled to make the finding that he did as to the absence of the necessary causative link between the overdose of misoprostol and the brain injury.

21. The breaches of duty by Surgi-Med in relation to the post-birth period were irrelevant to causation. The established failure to monitor the foetal heart rate between 8.00 pm on 18 May and 12.30 am on 19 May had not been shown to cause the injury to Aeden. That finding was accepted by Aeden before the Court of Appeal and at the hearing before the Board to the extent that the period prior to Dr Abdulla's return to the hospital was no longer in issue.

22. The trial judge had recorded the conflicting expert witness testimonies summarised at paras 14 and 15 above about the likely causes of Aeden's injury, namely (i) a viral infection, (ii) a hypoxia-ischaemia injury process prior to labour or (iii) a hypoxia-ischaemia injury process during labour. He did not conduct an analysis of that contested evidence in the operative part of his judgment.

23. It was in relation to the alleged absence of FHR monitoring that the dispute on timing had become central. Aeden claimed a failure to monitor the FHR adequately for 105 minutes ending with delivery at 6.15 am, contrary to a duty to carry out frequent FHR measurements. A central issue was whether there had been sufficient time for foetal distress and consequent injury to occur during an absence of monitoring in the intrapartum period. The tenor of the expert evidence given at the hearing had been that it would have required an hour or more of the necessary dangerous reduction in blood flow known as PPHI during labour to cause the type of injury involved. It was established that there had been no FHR monitoring from the end of the attempts at vaginal delivery until birth at 6.15 am. Dr Abdulla and Surgi-Med maintained that period was 5.30 am. to 6.15 am, with Aeden contending it was between 5.00 and 6.15 am. All counsel agreed at trial that unless the evidence established that there had been at least an hour during which a hypoxic event could have occurred undetected, causation could not be established.

24. Much of the evidence on the issue focused on the time at which Mrs Balwah's membranes had ruptured, following which Dr Abdulla had been called and had attended to attempt delivery. She and her mother gave evidence of noting the time of the membrane rupture at 3.00 am, the attendance of Dr Abdulla at 4.00 am and the attempted vaginal delivery at 4.00 am to 5.00 am. The trial judge rejected their evidence as unreliable on the point. Dr Abdulla's evidence had been that after he was called by the midwife, he had arrived at the hospital at 4.30 am and attempted delivery until 5.30 am, however he conceded that he had no recollection of events given the passage of time. Accordingly, the trial judge decided that he could not rely on Dr Abdulla's evidence about timing unless it was confirmed by a written record. The matter would require to be resolved by interpretation of such contemporaneous notes as existed.

25. There were two relevant contemporaneous notes of Dr Abdulla which read:

> "19.5.02 4am — Called out to see patient who is fully dilated. Vaginal delivery attempted for one hour without progress. Foetal head descended up to level of spines. Caput ++ - No MSL FH Regular. Episiotomy given to facilitate delivery."

And:

> 5.30 am "lcsc stet."
>
> (It was accepted that "stet" was a typo and should have been "stat", short for "statim", meaning without delay.)

Dr Abdulla's note did not resolve the matter, but the clinic's records contained a note made by Nurse Hosten which read:

> "19/5/02 | 4.30 Approx | 1–3 Mod–S | 136 R | Os fully dilated"

(1-3 was the recorded rate of contractions with Mod-S indicating moderate to severe pain and Os an abbreviation for the opening of the cervix.)

26. The trial judge considered that Nurse Hosten's note, recorded as 4.30 am, given its contemporaneous nature, was unlikely to have been deliberately fabricated. Notwithstanding some concerns about the nurse having failed to record certain details about the condition and status of Aeden and his mother, there was no reason to doubt the time of 4.30 am specified on the entry. It was also less likely that there would have been a note of measured contractions and of full cervical dilation if Mrs Balwah had been in the middle of an hour-long attempt at vaginal delivery at 4.30 am. The judge concluded that on balance the attempted delivery had commenced at 4.30 am. The parties had agreed that in that event Aeden's condition could not have occurred during the intrapartum period and could not have been caused by breach of duty of either Surgi-Med or Dr Abdulla.

27. The judge concluded (at para 147):

> "In the circumstances, the claimant's case must be dismissed, it is not necessary for me to take the further step and consider further whether the breaches of … duty actually caused the damage, as it is not possible for them to have done so."

Judgment of the Court of Appeal

28. Aeden appealed the trial judge's decision to the Court of Appeal, which heard the appeal on 21 July 2023 and issued a decision on 30 July 2024, allowing the appeal in respect of Dr Abdulla and entering judgment against him, remitting the issue of damages to be determined by a Master in Chambers. The trial judge's decision in relation to Surgi-Med was upheld.

29. The court set out in detail the parties' pleadings in relation to the timing issue, summarised at paras 8 and 10 above and reproduced the note of Dr Abdulla, the terms of which are recorded at para 25 above, but it omitted the 5.30 am part of the doctor's entry. The absence of any application by Dr Abdulla's counsel to amend his pleadings further following the discussion in evidence about the inconsistency between what was pled and his witness statement was regarded by the court as "of great significance to the outcome of this appeal".

30. At paras 40 and 41 of the judgment the court recorded the duties of care owed to Aeden by Surgi-Med and Dr Abdulla as found by the trial judge. Surgi-Med owed a duty of proper record keeping and Dr Abdulla had a duty to competently deliver Aeden and avoid doing anything that would cause Aeden or his mother avoidable harm. The specific breaches of duty found by the trial judge were correctly noted, namely Surgi-Med's failure to keep proper records of Aeden's post-birth condition and discharge and to monitor the foetal heartbeat for four-and-a-half hours from 8.00 pm on 18 May 2002 and Dr Abdulla's use of an excessive dose of misoprostol to induce labour.

31. The court narrated (at para 109) that it had identified the following issues for consideration in determining the appeal:

> "(i) Whether the judge was plainly wrong in relying on the hospital's notes;
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> "(ii) Whether the judge was plainly wrong in permitting the first respondent to re-amend its defence;
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> "(iii) Whether the judge was plainly wrong in permitting Dr Abdulla to deviate from his pleaded case and in particular whether the judge was wrong to uphold an objection against Dr Abdulla being questioned on his amended defence;

> "(iv) Whether the judge was plainly wrong in his finding as to vicarious liability; and
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> "(v) Whether the judge was wrong in his finding that there was no evidence of causation."

The challenge to the vicarious liability finding has not been pursued before the Board and need not be considered further.

32. The court determined that it had not been an unreasonable exercise of discretion for the judge to allow the use of the hospital notes at trial. They had been annexed to Aeden's mother's statement, and she had been his principal witness at trial. On what it characterised as "the first pleading issue", the decision to permit Surgi-Med to amend its written case on timing during the trial, the court considered the applicable Civil Proceedings Rules ("CPR"), Part 20 of which addresses the circumstances in which a party's statement of case may be amended after the first case management conference. Rule 20.1(3) as amended in 2011, provides that the court "shall not" give permission to change a statement of case after that stage unless there is both a good explanation for the late change and the application has been made promptly. Rule 20.1(3A) requires the court, if it is exercising a discretion to allow amendment, to have regard to six listed factors in deciding whether to give permission for late amendment of a written case, including the interests of the administration of justice, practical consequences and prejudice. The court noted that the amendments to rule 20.1 had softened the previous prohibition on the court permitting amendment after the first case management conference. It was now empowered to do so if there was a good explanation for the failure and the application was promptly made. If so, the exercise of discretion was triggered.

33. Aeden had sought to rely on events earlier in the litigation when the Court of Appeal had overturned the first instance judge's order permitting him to amend his pleadings with reference to the significance of the CT scan referred to at para 7 above. The CT scan was performed when he was 19 days old and initially was thought to show no abnormality of the brain. That was Aeden's pleaded position when the proceedings were issued, but that position was erroneous. The admittedly poor image available to experts for inspection in fact showed that there was abnormality. That was something on which all the relevant experts were agreed although the precise nature of the abnormality was not apparent from the scan. Aeden maintained that Surgi-Med's proposed late amendment should have been similarly rejected, not least to show a consistent approach. But that decision had been overturned because the claimant's side had failed to act promptly and had no good explanation for the delay, such that the exercise of discretion did not arise. The court rejected Aeden's claim that the judge had acted unreasonably in allowing Surgi-Med's late amendment. That no objection had been taken to the amendment was a relevant factor and the judge had been entitled to exercise his discretion in favour of allowing it. In any event, regardless of Surgi-Med's amendment, such

evidence as that defendant led on the issue (Dr Anirudh Mahabir, one of its Directors) had supported the case for the appellant on timing.

34. The court then addressed what it characterised as "the second pleading issue" and the trial judge's statement that if there was clear evidence to the contrary Dr Abdulla should not be bound by his admission about arriving at 4.00 am on 19 May 2002. This was described as a "contingent decision", the Court of Appeal expressing the view that there had been no such clear evidence to satisfy the contingency. The episode at trial narrated at para 11 above, where Dr Abdulla's counsel had objected to his being cross-examined on the discrepancy between his written case and his evidence was then explored. It was regarded as significant that Dr Abdulla's counsel had indicated an intention to amend the pleadings should Dr Abdulla remain unshaken in evidence that he had arrived at the clinic at 4.30 am. The court concluded that the trial judge's decision to uphold the objection and direct that the issue be left for submissions on credibility was an example of his discretion being "wrongly and unreasonably exercised". A professional litigant such as Dr Abdulla could understand and was required to take responsibility for his pleadings. It had been wrong for the judge to "shut out" evidence that in the court's view may have "served to clarify a very obscure part of the case".

35. On the central issue of causation, the court accepted that it should not interfere with the judge's two key findings, namely that neither Surgi-Med's failure to monitor the FHR between 8.00 pm and 12.30 am nor Dr Abdulla's overdose of misoprostol had been shown to cause Aeden's cerebral palsy. Those were not plainly wrong. In relation to the timing issue, the court stated (at para 168) that the judge had considered this to relate to an allegation of negligence against Dr Abdulla "by general mismanagement of the labour and delivery" of Aeden. The agreement between the parties before the trial judge, that for Aeden's injuries to have been caused by PPHI there would have to have been PPHI for at least an hour after attempted vaginal delivery ceased, was reframed by the Court of Appeal as being that resolution of the timing dispute would confirm whether Mrs Balwah suffered prolonged second stage labour.

36. The Court of Appeal considered that the trial judge had erred in three ways. First, he ought not to have inferred that there would be no measurement of contractions and recording of full dilation intrapartum, as that was a matter on which only an expert could comment. Secondly, he had failed to take into account the referral letter of Dr Aguilar who had written within hours of Aeden's birth that second stage labour had been prolonged. That failure was a material error. Finally, the judge had failed to pay due regard to Dr Abdulla's pleaded admission that he had arrived at the hospital at 4.00 am on 19 May 2002. In the view of the Court of Appeal he was plainly wrong to do so. The oral evidence was unreliable, Dr Abdulla's note was ambiguous, and Nurse Hosten's note provided indirect information requiring inference to be drawn. In the absence of the "clear evidence" requirement he had set being satisfied, the judge ought to have held Dr Abdulla to his pleaded case.

37. As the trial judge should have made a finding that Dr Abdulla arrived at 4.00 am, the conclusion to be drawn was that second stage labour lasted between 4.00 am and 5.30 am which allowed adequate time for the condition of PPHI to cause Aeden's brain damage. Having decided that, rather than send the case back for a rehearing the court was able to undertake the necessary interpretation of the notes itself, and then doing so, it declared that:

> "The inescapable conclusion is that [Aeden] should have succeeded in establishing causation."

Issues for determination in the appeals

38. The parties agree that there are three issues for the Board to determine:

(i) Whether the Court of Appeal erred in reversing the trial judge's factual finding of Dr Abdulla's time of arrival.

(ii) Whether, if the Court of Appeal was correct to find that the second stage of labour began at 4.00 am, it erred in entering judgment against Dr Abdulla, and in particular, whether it erred in finding, as a result, that brain damage occurred in the second stage of labour, and that the elements of negligence and causation were established.

(iii) Whether, if the Court of Appeal was correct to find that Dr Abdulla was liable for Aeden's injuries, the finding of liability should have been applied to Surgi-Med on the same basis.

The Board's consideration of Dr Abdulla's appeal

39. Dr Abdulla contends that the Court of Appeal made several errors. There had been no basis to interfere with the trial judge's finding that Dr Abdulla had arrived at the hospital at 4.30 am on 19 May 2002 (and therefore that the one hour of attempted delivery ended at 5.30 am, leaving insufficient time for the injury to have occurred during an unmonitored period). Even had there been such a basis, the court had misunderstood the breaches of duty found, had wrongly considered that the parties had agreed that causation could be established by determining the time of Dr Abdulla's arrival and had erroneously considered that an arrival time of 4.00 am resulted in Mrs Balwah being subjected to prolonged labour. Surgi-Med supports Dr Abdulla's appeal and adopted his submissions. The Board will address each of these propositions in turn.

40. The correct approach for an appellate court asked to substitute its own finding of fact for that of a trial judge is to exercise judicial restraint and give due deference to the conclusion on primary facts by the first instance judge, who will have had the advantage of seeing and hearing all of the relevant evidence. In reiterating this principle in *Christo Gift v Dr Keith Rowley* [2025] UKPC 37, the Board approved the following factors expounded by Lewison LJ in *Volpi v Volpi* [2022] EWCA Civ 464; [2022] 4 WLR 48, at para 2, as those which an appellate court must consider:

> "(i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
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> "(ii) The adverb 'plainly' does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
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> "(iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
>
> "(iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
>
> "(v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
>
> "(vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked

over or construed as though it was a piece of legislation or a contract."

41. While the Court of Appeal in this case articulated the impugned findings as falling within the "plainly wrong" category, the Board has concluded that each of the criticisms made involved a departure from the accepted approach of due deference to first instance findings. The first of the three criticisms made of the trial judge's finding that Dr Abdulla had arrived at 4.30 am and then started the attempts at vaginal delivery was that he ought not to have inferred that the nurse's note bearing the time of 4.30 am was likely to be accurate because she had recorded the level of contractions and that Mrs Balwah was fully dilated. The Court of Appeal considered that this was a matter for the experts. Even accepting that proposition for present purposes, the court appears to have overlooked, or been unaware of, a passage in the cross-examination of Aeden's expert witness Dr Jaiyesimi in relation to the nurse's note. During cross-examination by counsel for Surgi-Med, the judge intervened to ask a question about the reference in the nurse's note to full dilation. He put to Dr Jaiyesimi that "During the attempt to have vaginal birth, you wouldn't measure dilation, would you?" to which the witness responded "No, you wouldn't" and "No, because it is already fully dilated". Thus, contrary to the Court of Appeal's working assumption, there was a basis in the expert evidence for the inference drawn by the trial judge on this point. While Dr Jaiyesimi was criticised in the judgment for being partisan in Aeden's favour when addressing the medical issues in dispute, he was a suitably qualified and experienced obstetrician and gynaecologist able to speak to routine practice in recording the stages of labour. As there was a basis in the evidence for the inference drawn by the judge, the Court of Appeal ought not to have found to the contrary.

42. The second criticism concerned the treatment of Dr Aguilar's referral note on Aeden's discharge, the court describing the trial judge's failure to take its reference to "prolonged second stage labour" into account as a material error. There are several difficulties with this approach. First, it flies in the face of the accepted working assumption that a trial judge has taken all of the evidence into consideration. Secondly, the trial judge had recited Dr Aguilar's note and its observations (at para 7 of his judgment) accurately as part of the factual background, expressly including it in his narration of the evidence. Thirdly, it was for the trial judge to give such weight to the terms of the referral note as he considered appropriate. Fourthly, the reference to "prolonged" is left unexplained by the note. The Court of Appeal may not have fully appreciated that the trial judge had the benefit of evidence about what constituted prolonged second stage labour. Dr Jaiyesimi's report confirmed that the second stage of labour should be no more than three hours (one hour passive, two hours active) in nulliparous women (those who have not given birth before). Aeden's case was that his mother was in second stage labour from 4.00 am to 6.15 am, which would not, on the face of it, fit the definition. Finally, Dr Aguilar had not been present during the one hour of attempted delivery and the source, far less accuracy, of his statement that second stage labour had been prolonged was not known. For all these reasons the court's second criticism was without proper foundation.

43. The third criticism was central to the Court of Appeal's decision to substitute the finding of 4.30 am with one of 4.00 am for Dr Abdulla's arrival at the clinic. This was framed as "the second pleading issue" by the Court of Appeal. Much of the argument before the Board focused on the rigorous rules for amendments to pleadings in the relevant CPR. However, at its core the dispute was about the admissibility of certain evidence and the implications of a conflict between some of the pleadings and the evidence led at trial. It was the lack of an application by Dr Abdulla to seek to amend his pleadings late that contextualised the point as relating to pleadings.

44. The development of the parties' pleaded positions on timing is set out at para 8 above. It is clear that when these were being framed, the timing of Dr Abdulla's arrival at the clinic and the subsequent attempts at vaginal delivery were part of the chronology of events rather than the focus of the alleged breaches of duty. Dr Abdulla's pleadings were not unequivocal on the issue of timing. For example, although admitting the times pled by Aeden he also contradictorily averred that Mrs Balwah was fully dilated at 4.30 am and that FHR monitoring took place thereafter during the one hour of attempted delivery. From September 2016 his witness statement had contradicted the admissions he had made in the pleadings about his arrival at the clinic in the morning of 19 May 2002. By the time Dr Abdulla gave evidence at trial on 26 March 2019, Surgi-Med had amended this aspect to focus the attempted delivery as ending at 5.30 am and the trial judge was faced with different positions on timing in the three parties' pleadings. The Court of Appeal seems to have approached matters as if Dr Abdulla's pleadings unequivocally advanced an arrival time of 4.00 am without contradiction, which as indicated above was not the position.

45. When the Court of Appeal decided that its substituted finding on timing should apply only to Dr Abdulla's case on the basis that he should take responsibility for his pleadings on the issue, it failed to recognise the inconsistency that this would create by effectively making different findings against two defendants in relation to the same fact. The absurdity of a finding as against Dr Abdulla that he arrived at the clinic at 4.00 am and a contradictory finding applicable to Surgi-Med that Dr Abdulla had arrived at 4.30 am does not feature as an issue in the Court of Appeal's decision, although that was the consequence of its decision. Where different parties take contradictory positions on a single fact, it is incumbent on a trial judge to make a single finding. In a situation where an appellate court decides that such a finding is plainly wrong, it is illogical to overturn it in relation to one party but not another, resulting in mutually inconsistent findings on the same fact. Put another way, the timing of Dr Abdulla's arrival at the clinic and subsequent attempts to deliver Aeden was squarely in issue at trial, both by competing written averments and in witness statements. The question for the trial judge was whether to allow the contradiction between Dr Abdulla's pleadings and his evidence to be put in issue having regard to all the available material, including Surgi-Med's pleadings. That was a task with which he was required to grapple, given the various conflicting positions before him on timing. The situation was quite different from that arising in *Gulf View Medical Centre Ltd v Tesheira* [2022] UKPC 38. In that case, also involving proceedings for medical negligence, the Board was considering an issue of whether a non-delegable

duty of care had been admitted in the pleadings. In contrast with the present case, the argument arose in the context of there being a concurrent defence by two appellants that resolved the point, as both were found to have admitted such a duty.

46. Aeden's counsel maintained before the Board that the significance of the relevant CPR on amendment of pleadings, rule 20.1(3), was that had Dr Abdulla sought leave to re-amend his case at the time of the objection to his cross-examination, the trial judge would have been bound to refuse any such application. The Court of Appeal had accordingly been correct to hold him to his pleaded case. This argument overlooks the use that Aeden's counsel sought to make at trial of the discrepancy between Dr Abdulla's written case and his evidence.

47. It is clear from relevant passages in the trial transcript that no objection was taken on Aeden's behalf to the admissibility of the evidence about timing within the witness statement of Dr Abdulla. In cross-examination, Aeden's counsel sought to undermine Dr Abdulla's credibility by challenging him on the perceived contradiction. He asked Dr Abdulla to look at a paragraph of his witness statement and put to him that it was inconsistent with his written pleadings. Dr Abdulla's counsel intervened to object and said:

> "Your Lordship remembers the other day, when [Surgi-Med's counsel] said he wished to amend his pleadings on timing that I indicated to your Lordship that I may well wish to amend my pleading but I would wait to do so until we had heard the evidence of Dr Abdulla and his cross-examination. And so that we knew what was the position and based on the evidence and not based on a technical pleading point.
>
> "So, I don't really think it is appropriate for [Aeden's counsel] to be putting this question to him. We can all see what the pleading says. The question is whether at the conclusion of Dr Abdulla's evidence, if he remains unshaken on the fact that he doesn't arrive till 4.30 [am] and the hour therefore lasts till 5.30 [am], I will make the appropriate amendment to the pleadings, if it was needed."

Exchanges between counsel and the judge on the point followed during which Aeden's counsel stated:

> "… I respectfully submit, I am entitled to suggests [sic] to him that he has changed the mind he had in 2013, changed the mind

> with different lawyers he had in 2016 and now wants to put forward a different timing."

Ultimately, he acknowledged:

> "I can deal with it simply by suggesting it to him and he can accept it or not. And we can leave it to submissions …"

To which the judge responded by confirming that he understood the point but decided:

> "I think it is best to leave it in [sic] submissions …"

These passages illustrate that there was no suppression of a chapter of relevant evidence. The judge was aware by that stage of the trial that the specific timing of events in the early hours of 19 May 2002 had become contentious. The context in which adherence to pleadings arose at trial was limited to this episode.

48. There are circumstances, albeit limited, in which a trial judge may permit a line to be taken that constitutes a departure from a written case, where the interests of justice so demand. In *Loveridge v Healey* [2004] EWCA Civ 173; [2004] CP Rep 30, it was confirmed (at para 24) that such a decision is one for the first instance judge, "having regard to all material matters". As Birss LJ put it in *Ali v Dinc* [2022] EWCA Civ 34 at [25]:

> "These problems are all concerned with the interests of justice and, in particular, with circumstances which cause prejudice to the losing party … the function performed by pleadings, lists of issues and so on, which is to give notice of and define the issues, is an important one; but is also why a judge can always permit a departure from a formally defined case where it is just to do so ... the judge's function is to try the issues the parties have raised before them, rather than to reach a conclusion on the basis of a theory which never formed part of either party's case."

The parameters of acceptable deviation from a written case were considered by Falk LJ in *Phones 4U Ltd v EE Ltd* [2025] EWCA Civ 869 at [195], who stated:

> "… I would not accept [counsel's] submission of a 'bright line' distinction between a departure from the pleaded issues and other evidence, the former being always impermissible. I would however agree that there is a spectrum, with cases of a wholesale departure from a pleaded case … being at an extreme end of decision-making that will clearly be impermissible."

49. In acceding to the proposition that Dr Abdulla should not have been permitted to derogate from his pleadings and concluding that the trial judge had been wrong to uphold an objection exploring that issue, the Board considers that the Court of Appeal erred. The judgment contains no analysis of how and when the discrepancies had arisen and whether any prejudice had been caused by the admission of evidence in relation to the different positions on timing and the determination of the point on that evidence. In any event, it is apparent that the trial judge understood the context of the argument about inconsistency between the evidence and the written cases and dealt with it by placing almost exclusive reliance on the contemporaneous notes. He was entitled to take that approach.

50. For the reasons given, each of the three bases relied on by the Court of Appeal for substituting its own finding of fact on the issue of timing for that of the trial judge was unjustified. There was no proper basis for revisiting a finding that the judge had been entitled to make on all of the material before him. In no sense could the decision that Dr Abdulla had arrived at 4.30 am and attended delivery thereafter be categorised as rationally unsupportable. There was ample evidence to support it. That addresses the first point in issue and is sufficient for Dr Abdulla's appeal to succeed.

51. The second branch of the appeal relates to the consequences of the substituted finding on timing and whether the Court of Appeal was correct in its understanding of the scope of the issues of breach of duty and causation. It is helpful to reiterate the limited breaches of duty of care that the trial judge found established, namely Surgi-Med's breach of specified record keeping duties and a failure to monitor the foetal heart rate for a four-and-a-half-hour period from 8.00 pm on 18 May and Dr Abdulla's administration of an overdose of misoprostol on 18 May 2002. While other breaches of duty were alleged, only those specified breaches were established. That was the backdrop against which causation came to be focused. Aeden had made a clear allegation of a later failure to undertake FHR monitoring during the 105 minutes prior to delivery at 6.15 am on 19 May. The trial judge did not specifically engage with that allegation. There was evidence of intermittent FHR monitoring during that period and until 5.30 am. The Board cannot reopen the question of whether additional findings of fact should have been made. In the absence of any finding of inadequate FHR monitoring before 5.30 am the appeal to the Board has proceeded on the basis that if the attempt at vaginal delivery ended at 5.30 am there was insufficient time during a period of no FHR monitoring for the incident causing Aeden's injury to have occurred.

52. It is clear from the first instance judgment that the trial judge understood the relationship between the timing issue and causation. Parties had agreed that a period of at least an hour after attempted delivery had ceased was required for the development of PPHI as a possible cause of Aeden's injury. Establishing that such a period had elapsed without FHR monitoring was a prerequisite for the possibility of a causative link between the established breaches of duty and Aeden's injury. In no sense could it have been determinative of that issue. As the trial judge clearly explained (at para 147, reproduced above at para 27) his determination that the cause of Aeden's condition could not have occurred during the intrapartum period rendered it unnecessary to take the further step of considering whether the breaches of duty in fact caused the damage.

53. The Court of Appeal's decision is illustrative of an incomplete understanding of the relevant causation issue. There was a failure to appreciate that, even if the second stage of labour had commenced at 4.00 am, causation could only be established by reference to one of the breaches of duty found. While the appellate court recorded correctly that an allegation of negligent mismanagement of labour had also been made in Aeden's case, it failed to acknowledge the absence of a finding by the judge establishing any such breach of duty. This oversight may explain the court's erroneous interpretation of the exercise being undertaken by the trial judge in stating (at para 168):

> "The judge considered the issue of the time of arrival of Dr Abdulla as it related to the allegation of negligence against him, by general mismanagement of the labour and delivery of Mrs Balwah in the intrapartum period."

To the contrary, the judge had approached matters correctly, by first identifying the duties of care owed and then specifying the extent of any breaches of duty by each defendant that he found established. He was explicit in accepting a submission on behalf of Dr Abdulla that it was not sufficient for Aeden to point to the breach and the damage and infer that the latter must have been caused by the former. Dr Abdulla's expert witness Dr Wilkerson had expressed the view that the injury was attributable to an incident prior to second stage labour. The judge explained that if that was correct, then neither of the breaches which he had found established could be causative of the injury. Nowhere in the judgment is there mention of general mismanagement of labour as a breach of duty or a reference to causation being addressed in that context.

54. Further, having decided that the relevant period commenced at 4.00 am the Court of Appeal gave no reasons for asserting that the "inescapable conclusion" from that substituted finding was that causation was established. The cause of Aeden's injury had not been established at trial, albeit that the expert witnesses had tended to support a conclusion that a pre-birth injury was more likely on the evidence than a viral infection. All that was established was that it could not have been caused by PPHI during the second stage of labour. Had the period without FHR monitoring been sufficient for the possible

development of PPHI, Aeden would still have required to establish, on balance, that with appropriate monitoring it would have been detected in time for intervention and a consequential safe delivery. None of that was decided by the trial judge who limited his decision to resolving the preliminary issue of whether it was possible that the breaches of duty he had found caused the injury. Having decided that in the negative, he did not offer his views on the substantive questions that would require to be answered if he was wrong to conclude that Aeden had failed to overcome the first hurdle in the causation exercise.

55. Insofar as the Court of Appeal considered that establishing a longer period after attempted delivery without FHR monitoring was sufficient to fulfil all necessary requirements of proving causation it erred. Had the Board decided to uphold the decision to substitute a new finding on the length of that period (from 5.00 am to 6.15 am), further procedure in the courts below to determine causation would have been necessary. Even then, Aeden's case could only succeed if the limited breaches of duty established were capable of causing the injury. It was not open to the Court of Appeal to make a finding of causative breach against Dr Abdulla. It should have referred the matter back for adjudication of the aspects of the case that remained undetermined. For these reasons, on the second issue raised, the Board concludes that the Court of Appeal went too far too fast in entering judgment against Dr Abdulla on the basis of the substituted finding.

Aeden's appeal against Surgi-Med

56. Aeden's appeal relates to the Court of Appeal's decision to find causation established only against Dr Abdulla, rather than against both defendants. For the reasons given, the Board considers that the trial judge's findings of fact on timing should not have been substituted, with the consequence that the trial judge's decision will be restored. The trial judge's findings were apt to preclude the possibility of causation being established against either Surgi-Med or Dr Abdulla. All of the points made above in relation to the Court of Appeal's misapprehensions about causation apply equally to Aeden's appeal. A finding that there had been a sufficient period during labour and prior to delivery for Aeden's injuries to occur, even if made as a single finding against both defendants, would not have been sufficient to establish liability against Surgi-Med. That is sufficient to dispose of the third issue.

Surgi-Med's cross-appeal

57. Surgi-Med's cross-appeal against the Court of Appeal's decision contends that the appeal by Aeden should not have been allowed as against Dr Abdulla. Counsel accepted that it was probably unnecessary and had been brought to avoid any suggestion that an independent cross-appeal should have been taken. As Dr Abdulla's appeal succeeds, it is unnecessary to consider Surgi-Med's cross-appeal.

Conclusion

58. For the reasons already given, Dr Abdulla's appeal is allowed. Aeden's appeal is refused and Surgi-Med's cross-appeal is refused as unnecessary. There were two separate issues described by the Court of Appeal as pleadings points in this case. While the central question in Dr Abdulla's appeal related to a discrepancy between pleadings and evidence rather than an application to amend, the discussion both before the Court of Appeal and before the Board involved consideration of the relevant CPR on late amendments.

59. The Board has previously noted that rule 20.1 of the CPR provides for a more inflexible regime for amendment than the corresponding Civil Procedure Rules for England and Wales. In *Bernard v Seebalack* [2010] UKPC 15; [2011] 2 LRC 176; (2010) 77 WLR 455 an issue arose about the interpretation of CPR r 20.1(3). The Board acknowledged that the introduction of rule 20.1(3) had been an attempt to introduce more discipline in the conduct of civil litigation and defeat the previous laissez-faire attitude to it, deciding that it would be wrong to adopt an interpretation of the rules that would undermine those attempts. Nonetheless the Board added the following rider:

> "If the local courts can be relied on to exercise their case management powers so as to give effect to the overriding objective, then it ought to be possible to relax the rules themselves to some extent. There is a place for inflexible rules in any system of justice. Sometimes the need for certainty is paramount. But inflexible rules can also lead to injustice as injustice is ordinarily understood. The Board recommends that the Rules Committee of Trinidad and Tobago consider whether and if so to what extent it feels able to change [rule] 20.1 so as to move closer to Part 17 of the England and Wales CPR."

The reference to the overriding objective is that contained in Part 1 of the CPR of Trinidad and Tobago providing that the overriding objective of the Rules is to enable the court to deal with cases justly.

60. The version of rule 20.1(3) under discussion in *Bernard* was subsequently substituted by a new sub-rule (3), along with the insertion of sub-rule (3A), by rule 11 of the Civil Proceedings (Amendment) Rules 2011. These amendments have introduced an element of discretion, but only if a litigant passes the threshold test of having a good explanation for not amending earlier and making a prompt application to do so. Where a party cannot fulfil the requirements of good explanation and promptitude, it could result in the exclusion of an amendment that the interests of justice would otherwise demand. The overriding objective in Part 1 of the Rules cannot be used to resolve matters. This could lead to the absurdity of witnesses, including experts, being bound by a pleaded

narrative or position that they know to be false. Counsel could be in a similarly invidious position. The consequences of the challenges posed by the inflexible threshold of rule 20.1(3) were live at an earlier stage of the current proceedings. As explained in para 33 above, the trial judge had permitted an amendment to introduce evidence of a review of the 6 June 2002 CT scan that had erroneously been assessed as normal. His decision had been overturned by the Court of Appeal on the basis that the threshold test for amendment had not been satisfied. Ultimately the parties agreed a form of words that would avoid the experts being constrained by the incorrect statement that there was no abnormality present in the neuroimaging.

61. This case has highlighted a potential difficulty with the threshold test in the current version of CPR r 20.1(3). The Board respectfully suggests that the Rules Committee of Trinidad and Tobago may wish to consider again whether amendment at any stage in proceedings should be subject to discretion, balancing prejudice against the interests of justice.